83-1410

CASE NO.

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

CARLOS OLIVERA-CHIRINO,
RAUL PINERA, and
FAUSTO MANUEL SANCHEZ,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION BELOW PRESENTS AN IMPORTANT QESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.

II. WHETHER THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING UNITED STATES v. LOPEZ-ORTIZ, 492 F.2d 109 (5th Cir. 1974); UNITED STATES v. REYES, 595 F.2d 275 (5th Cir. 1979); UNITED STATES v. PINTADO, 715 F.2d 1501 (11th Cir. 1983); UNITED STATES v. PARDO, 636 F.2d 535 (D.C. Cir. 1980); AND UNITED STATES v. LAUGHMAN 618 F.2d 1067 (4th Cir. 1980).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America

Alberto Lopez-Llerena

Felix Parra

Jose Borges

Jose Delfin Mule Vasquez

Lazaro Cruz, Jr.

Hector Theodore Valdes

Fausto Manuel Sanchez

Raul Pinera

Carlos Olivera-Chirino

Jose Luis Marino

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Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

OPINION BELOW

The Opinion of the lower court is reported in United States v. Lopez-Llerena, 721 F.2d 311 (11th Cir. 1983), rehearing denied, 721 F.2d 311 (11th Cir. 1983).

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioners' convictions was entered On August 30, 1983. On December 16, 1983, the Eleventh Circuit denied the Petitioners' Petition for Rehearing. On January 6, 1984, the Eleventh Circuit denied Petitioners' Suggestion for Rehearing En Banc.[1] On February 15, 1984, Circuit Justice Powell entered his order extending the time for filing this petition to and including March 15, 1984. See No. A-651.

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[1] The judgment and opinion on rehearing are contained in the Appendix to the Petition for Writ of Certiorari filed on February 14, 1984, in Alberto Lopez-Llerena, et al., v. United States, Case No. 83-1343; the order denying rehearing en banc is contained in the Supplemental Appendix to the Petition for Writ of Certiorari filed on February 14, 1984, in Hector Theodore Valdes v. United States, Case No. 83-1428. Petitioners respectfully adopt the Appendix in Lopez-Llerena and the Supplemental Appendix in Valdes.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment V:

> No person shall. . .be deprived of life, liberty, or property, without due process of law;. . .

U.S. Const., Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

21 U.S.C., Section 846, attempt and conspiracy:

> Any person who attempts or conspires to commit any offense defined in this sub-chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The Petitioners, CARLOS OLIVERA-CHIRINO, RAUL PINERA, and FAUSTO MANUEL SANCHEZ, were arrested as a result of a law enforcement raid on two neighboring houses in a residential area in Key Largo, Florida, following an off-load of marijuana from two vessels docked behind the premises. They, along with eight co-defendants, were charged in a two-count indictment with conspiracy to possess with intent to distribute marijuana and with possession of marijuana. An initial trial resulted in a hung jury. At the second trial, the petitioners' motions for judgment of acquittal at the close of the government's case and again at the close of all the evidence were denied. (Tr. 777-779.) On July 1, 1982, the jury retired to deliberate its verdict. (Tr. 934). Approximately one and one-half hours into its deliberations, the jury

requested and was given reinstruction relative to reasonable doubt. (Tr. 934). A half hour later, the jury requested reinstruction on the legal definition of conspiracy and possession of marijuana which the trial court provided. (Tr. 936-937). Forty-Five minutes later, the jury conveyed the following message:

> Your Honor, with regrets, please be advised that we are unable to reach a verdict at this time. It is also possible that we may not reach one at all. (Tr. 938).

The jury was dismissed for the night. The following morning, after the jury had deliberated for nearly two hours, the jury told the court:

> Please be advised that we are deadlocked. Cannot reach a verdict. [Emphasis by the jury.] (Tr. 945).

The trial court presented a modified Allen charge to the jury and after approximately 35 minutes, the jury

requested of the court:

> Could you please give us a list by name indicating where each defendant was arrested? (Tr. 950).

The jury was instructed to rely upon its collective individual memories and recollections of the evidence. (Tr. 953).

Over two hours later, the jury reached its verdict, finding every defendant in the case guilty of conspiracy under Count I of the indictment and not guilty of possession of marijuana under Count II of the indictment. (Tr. 954-959).

The evidence showed that when various police vehicles with flashing blue lights and sirens sounding converged on the premises, various suspects ran in different directions. At least three people climbed an external stairway and went into the upstairs portion of one of the two neighboring houses raided. Four

persons were observed running toward a cluster of sea grape bushes. Three persons were arrested after being observed running towards a fence near a canal. A final person was found hiding under a dock. None of the eleven persons ultimately arrested was ever identified as having participated in any way in the off-load operation. Petitioners RAUL PINERA and FAUSTO MANUEL SANCHEZ were found in the cluster of sea grape bushes. Petitioner CARLOS OLIVERA-CHIRINO was found in the canal adjacent to one of the two houses.

With regard to the identification of Petitioner CARLOS OLIVERA-CHIRINO, Customs Patrol Officer Ransom tesitifed that he arrested a particular defendant and that Monroe County Deputy Sheriff Rick Neal arrested another person in the canal. (Tr. 96-97). Officer Ransom initially testified that the man pulled

out of the water by Deputy Neal was defendant Felix Parra. (Tr. 116-117). In fact, defendant Parra was actually arrested in one of the houses behind the canal. (Tr. 745). At a subsequent juncture of his testimony, Officer Ransom admitted that his initial identification was incorrect and that the person pulled out of the canal by Deputy Neal was petitioner OLIVERA-CHIRINO. (Tr. 120). However, Deputy Neal testified that he did not arrest petitioner OLIVERA-CHIRINO and could not identify him in court. (Tr. 607).

Customs Officer Ransom admitted that during the first trial in this case, he had a problem identifying petitioner OLIVERA-CHIRINO. (Tr. 211). At the close of the government's case, counsel for petitioner OLIVERA-CHIRINO moved for a judgment of acquittal based upon the failure of the government to prove the

arrest and identification of petitioner OLIVERA-CHIRINO. (Tr. 714-722). The trial denied this motion but emphatically stated that the evidence against petitioner OLIVERA-CHIRINO was very thin. (Tr. 736).

There were no fingerprints, no photographs, no evidence of recent exertion, no marijuana residue, no statements, no contraband on any of the persons arrested.

There was, however, substantial evidence to show that other people at the scene had avoided detection and apprehension. Nevertheless, the Petitioners were arrested, charged and convicted because of their proximity to the off-load operation. By the agents' own admission, they would have, and did, arrest everyone they found. Because eleven people had been observed participating in the off-load and eleven people were ultimately

arrested, each of those arrested was tried and convicted based entirely on his presence in the area. This is so despite the conceded inability of the arresting officers to have apprehended all those who participated. Such a result does not comport with either the promise of a fair trial or the guarantee of due process afforded by the Fifth Amendment to the United States Constitution.

The Eleventh Circuit's jurisdiction to entertain Petitioners' direct appeal was predicated upon 28 U.S.C., Section 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT BY HERALDING THE END OF THE TIME HONORED MERE PRESENCE RULE.

The decision of the Eleventh Circuit Court of Appeals affirming the Petitioners' convictions for conspiracy to possess marijuana signals the death knell of the "mere presence doctrine" heretofore established by this Court. It has long been the rule, as held by this Court in United States v. DiRe, 332 U.S. 581, 593 (1948), that mere presence is insufficient, without more, to sustain a conviction for conspiracy. Likewise, equally well established is the doctrine

repeatedly expressed in Sibron v. New York, 392 U.S. 40, 62-63 (1968), and Ybarra v. Illinois, 444 U.S. 85, 91 (1980), that:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.

The decision of the Eleventh Circuit in this case signifies an extraordinary and irreconcilable departure from the time honored rule that mere presence, even when coupled with flight, is not alone enough upon which to predicate criminal convictions.

In the case at bar, two vessels, the "Sunshine" and the "Odette", were observed by police being unloaded of their cargoes of marijuana during the early morning hours of December 22, 1981. The "Sunshine" arrived first, docked behind a house in Key Largo, Florida, and

approximately an hour later, after the "Sunshine" had departed, the "Odette" docked behind a house next door. (Tr. 82-84, 88). It appeared to surveilling officers that eleven people, all together, were involved in each off-load operation. None of the defendants at trial was identified by any government witness as having been involved in either off-load operation. None of the government's witnesses could identify any defendant as having been observed at any specific location on the 21st or 22nd of December, 1981, prior to his arrest. (Tr. 418-419). No surveilling officer was able to see the faces of any of the people at the scene. They could not describe what any of the people were wearing. The individuals involved could only be seen as silhouettes. (Tr. 84-85). It was not known whether the people seen were black or white. (Tr. 217,

454).

There was no attempt to obtain fingerprints in this case. (Tr. 124-126). Although the "Sunshine" was later seized in the Miami River, no evidence was presented that it was tested for latent fingerprint impressions so as to identify the people who had been on board it. (Tr. 156-157). No evidence was presented that any of the suspects had marijuana residue on their clothing. Apparently, no attempt was made to gather such evidence. (Tr. 218-222). Radio broadcasts and communications related to the investigation were monitored; however, none were admitted into evidence or described by any witness. (Tr. 150). No conversations or interceptions were recorded. (Tr. 150).

No attempt was made to take photographs of the off-loading operation. (Tr. 151, 242). No evidence was pre-

sented that any of the defendants on trial owned either of the houses or vessels involved in this case. (Tr. 193-194). Later investigation revealed that one of the houses was owned or rented by an individual uncharged in this case. (Tr. 152). Papers located on the vessel "Odette" indicated that its owner was also a person who was not arrested. (Tr. 147).

The critical deficiency in the government's case against the Petitioners involves the fact that the prosecution was based solely upon a "numbers game." All that was certain was that anyone on the premises or in the immediate area would be arrested even though the actual arresting officer had no knowledge of how many people were involved in the off-loading operation. (Tr. 301-302). However, since eleven people were observed in the off-loading operation, it was pre-

destined that eleven people would be arrested and face trial in this case.

The defect in the government's theory of the case, however, involved not only the insufficiency of the evidence against the Petitioners, but the fact that there was evidence that guilty persons involved in the off-load operation had escaped detection while innocents were indiscriminately arrested and charged. The undisputed evidence presented by the government demonstrated that Drug Enforcement Administration Agent William Simpkins took possession of two wallets discovered in the first house. (Tr. 668-669). The two people identified by documentation found within the wallets were not arrested. (Tr. 669-671). The wallets contained various checks, bank deposit slips, documents, and approximately eight hundred to one thousand dollars in cash. (Tr. 686). Clearly

those two persons escaped detection.

In addition, the government's own evidence established that one man observed during surveillance carried a machine gun type weapon described as an Uzi machine gun. (Tr. 90, 371-372). None of the eleven defendants arrested in this case possessed a weapon. Despite an extensive search, no weapons were found in either house, the surrounding canals or grounds. (Tr. 306, 322).

In addition to the missing weapon, the two people who abandoned their wallets, money, and personal possessions at the scene, and whatever unknown, unobservable people remained within the premises and in the proximity of the vessels, there existed the express admission by the government witnesses that more than eleven people arrested may have been involved. Prior to the raid, the roadway coming into the area was not

closed. (Tr. 207). Accordingly, after eleven people were apprehended, a search was nevertheless conducted of the area because it was unknown whether or not more people were in front of the house. (Tr. 209-210). One surveilling officer expressly admitted he could not testify whether or not any of the suspects had escaped from the area and avoided apprehension. (Tr. 423).

Thus, the decision of the Eleventh Circuit invites, if not compels, adoption of the rule that one's suspicious mere presence at the scene of a crime sustains proof beyond a reasonable doubt of his guilt. In addition, the departure of this case from established United States Supreme Court doctrine is aggravated by the court's misplaced reliance upon the Eleventh Circuit's own prior decision in United States v. Blasco, 702 F.2d 1315 (11th Cir.), cert. denied, sub nom,

Galvin v. United States, ___U.S.___, 104 S.Ct. 275 (1983).

However, as set forth in the factual recitation in Blasco at 1320-1321:

> The Cohen estate is bordered by water on two sides--the southern end of the residence rests upon a canal, and the western portion of the property extends to the Spanish Harbor Channel. The remaining two sides are enclosed by a chain-link fence, and, on the night in question, the gate across the road leading to the residence was padlocked.

Moreover, the Blasco court revealed that "the officers moved. . .to. . .a point from which they could see the entrance to the canal leading to the Cohen property." Id. at 1321. Also, the officers involved in the Blasco raid were "instructed to shut off the possible avenues of escape." Id. Finally, regarding the nature of the area involved in Blasco, the court expressly noted: "The Cohen estate is situated in a secluded area, the kind

frequently utilized for off-load operations." Id. at 1332.

In the case at bar, the undisputed testimony of the arresting officers was that they could not preclude the possibility that someone escaped from the residences involved prior to the time the officers reached the scene from the surveillance point across the canal. (Tr. 423). No officers were positioned to prevent suspects from escaping via the canals which ran along both sides of the area in question. (Tr. 480). The photographic evidence introduced at trial clearly revealed that the area in which the residences were located was not private and secluded, as in Blasco, but rather contained dozens of nearby homes into which any number of suspects could have entered and hidden. In addition, the record detects numerous escape routes along hundreds of yards of seawall giving

access to both canals.

If the mere presence doctrine is to enjoy further viability and if this Court's precedent is to be honored, certiorari must be granted to remedy the constitutional aberration created by the Eleventh Circuit Court of Appeals in this case.

II.

THE DECISION BELOW CREATES IRRECONCILABLE CONFLICT WITH VARIOUS CIRCUIT COURT DECISIONS INCLUDING UNITED STATES v. LOPEZ-ORTIZ, 492 F.2d 109 (5th Cir. 1974); UNITED STATES v. REYES, 595 F.2d 275 (5th Cir. 1979); UNITED STATES v. PINTADO, 715 F.2d 1501 (11th Cir. 1983); UNITED STATES v. PARDO, 636 F.2d 535 (D.C.

Cir. 1980); AND UNITED STATES v. LAUGHMAN, 618 F.2d 1067 (4th Cir. 1980).

Justice Jackson, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 445-6 (1949), commenting on the then "present drift" of the "elastic, sprawling, and pervasive offense" of conspiracy, noted:

> The unavailing protest of courts against a growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

The decision of the Eleventh Circuit sought to be reviewed herein is at constitutional odds with Justice Jackson's prescient warning. Other circuits, however, have faithfully observed Justice Jackson's caveat.

The decision of the Fifth Circuit

Court of Appeals in United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir.), cert. denied, 419 U.S. 1052 (1974), is materially indistinguishable from the case at bar. There, a nighttime surveillance revealed numerous people unloading large gunny sacks from a truck to the garage of a residence. A raid was conducted on the premises and the participants in the unloading operation "broke and ran." Two people were taken into custody in the immediate vicinity and Lopez-Ortiz was found hiding behind a rock wall dividing the premises from the next door property. Despite the fact that numerous gunny sacks were in plain view and the odor of marijuana was prevalent, the court reversed the defendant's conviction for conspiracy to possess marijuana with intent to distribute it since his presence and flight did not prove the offense charged. Moreover, the

court's decision was not altered by its finding that the defendant's story was impeached in at least three ways and its conclusion that these inconsistencies resulted in a jury verdict of guilty. The court, noting that the issue before it was not the credibility of the defendant's story, held:

> At best, the evidence establishes only that he was present in the area and had fled from federal officers. It does not show that he actually participated in the unloading operation, or began his flight from near the truck. Further, there was no testimony by the government agents that Lopez-Ortiz had approached and entered the house prior to the raid. Indeed, all the arresting officers could say was that they found him behind a nearby rock wall. 492 F.2d at 115.

The identical conclusion should have been reached by the Eleventh Circuit Court of Appeals in this case.

That court's decision is equally

irreconcilable with the decision of the court in United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). In Reyes, the court reversed the convictions of four men who were found aboard an airplane from which marijuana had been ejected into the Gulf of Mexico. In Reyes, the government suggested that one or more of the four men must have pushed the marijuana bales from the low-flying plane into the Gulf, and then smeared the interior of the plane with pineapple because the pilot could not have accomplished these tasks while flying the airplane.

The court reasoned that even accepting the government's premise as correct, there was still insufficient evidence of participation by any of the four men because there was no direct testimony that any particular defendant either ejected or helped eject the marijuana, or did anything to mask the odor of the

cargo.

In language particularly appropriate to the case at bar, the Reyes court stated:

> Each of the defendants was entitled to have his guilt or innocence determined as an individual; the government failed to prove beyond a reasonable doubt that each defendant or any particular defendant participated in any way in the importation scheme beyond being present in the aircraft. 595 F.2d at 281.

As here, the government in Reyes urged the court to hold that the mere presence of the four men on the aircraft logically indicated that one or more of the men must have participated by pushing the bales out of the plane and smearing the cabin with pineapple. The Reyes court rejected this argument because "there was no direct testimony that any of them did so, much less that all of them participated." Id. (Original

emphasis.)

The contrary result reached by the Eleventh Circuit in this case, and even its own internal conflict, is palably demonstrated by its subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). The case at bar and Pintado are remarkable for their factual similarities. Both involved Customs surveillances of houses bordering canals in the Florida Keys. Both involved marijuana off-load operations from a vessel docked behind the premises involving numerous, unidentified people. In each case, a raid by numerous Customs officials resulted in the arrests of all the suspects they were able to find at the scene.

In Pintado, after two suspects were arrested outside, others ran into the house and were followed by Customs agents:

> Two agents climbed the stairs to the second floor of the house and were confronted with a pair of locked doors. An official knocked on one of the doors, announced in English "U.S. Customs" and asked whoever was in the room to come out. When no response was received, the door was forced open. Appellant, wearing a pair of pants and perhaps a shirt, was found hiding in the closet. 715 F.2d at 1503. (Footnote omitted.)

The Pintado court, relying upon the Fifth Circuit's United States v. Lopez-Ortiz, supra, correctly applied the law that "neither mere presence at the scene in conjunction with fleeing or hiding from officers of the law alone will support a conspiracy conviction." 715 F.2d at 1504. The court thus held:

> The government provided no evidentiary basis other than [Pintado's] presence in the house, hiding in the closet, from which an inference of conspiratorial participation could be drawn. Id. [Emphasis added.]

Despite the graphic similarities in

the two cases, the Pintado court reversed the conspiracy conviction while the Lopez-Llerena court in the case at bar affirmed.[2]

Finally, the Eleventh Circuit's abrogation of the mere presence rule is at odds with the decisions in United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980), and United States v. Laughman, 618 F.2d 1067 (4th Cir. 1980). As stated by the Laughman court at 1075:

> Simply proving the existence of a conspiracy, however, cannot sustain a verdict against an individual defendant. There must also be a showing of that defendant's knowledge of the conspiracy's purpose and some action indicating his participation. United States v. Falcone, 311 U.S. 205, 210-211, 61 S.Ct.

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[2] The court's decision in the case at bar engages in obvious hair-splitting in its attempts to reconcile the contrary result reached in Pintado. See 721 F.2d at 313-314, & notes 3 and 6.

204, 206-207, 85 L.Ed. 128 (1940). . .. (Emphasis added.)

The Pardo court, at 549, held:

> The sole piece of evidence against Pardo is that he was present in a confined area where a drug transaction was obviously taking place. One principle of law firmly rooted in this circuit is that mere presence at the scene of a drug transaction or mere proximity to drugs seized is not sufficient to establish guilt.***
>
> [T]here must be something more than mere presence at the scene of a criminal transaction. There must be some conduct that links the individual to the narcotics and indicates that he had some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental by-stander. It may be foolish to stand by when others are acting illegally, or to associate with those who have committed a crime. Such conduct or association, however, without more, does not establish the offenses here charged. [Original emphasis.]

The opposite conclusion reached by

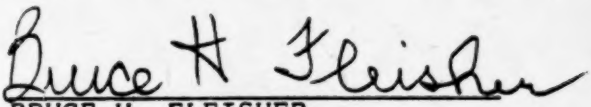
the Eleventh Circuit here is utterly irreconcilable. Certiorari must be granted to resolve the conflict created by the Eleventh Circuit Court of Appeals as well as to remedy the injustice suffered by Petitioners CARLOS OLIVERA-CHIRINO, RAUL PINERA, and FAUSTO MANUEL SANCHEZ.

CONCLUSION

The case below characterizes a radical departure from the substantive body of case law developed by this Court as well as the other Circuit Courts of Appeals regarding mere presence at the scene of a crime. The matter involved in this case is of extreme judicial significance. The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. For the reasons and authority advanced above, therefore, the Petitioners strenuously urge this Court

to grant its Writ of Certiorari in this case.

Respectfully submitted,



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